Supreme Court, U.S.
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No. 94-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

RUSSELL CALAMIA,

Petitioner,

v.

HARRY K. SINGLETARY, JR.
Secretary, Florida Department
of Corrections,

Respondent.

Petition For Writ of Certiorari to the
Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277(1) (i), Florida Statutes (Supp. 1992), to offenses committed before the effective date of the statute and the effect of the passage of section 944.278, Florida Statutes (1993) violate the prohibition against ex post facto laws in Article I, Section 10, Clause 1 of the United States Constitution.

2. Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277(1) (i), Florida Statutes (Supp. 1992) and Section 944.278 Florida Statutes (1993), is an unconstitutional violation of the prohibition against Bill of Attainder contrary to Article I, Section 10, of the United States Constitution.

3. Whether Section 944.277(1) (i), Florida Statutes (Supp. 1992) and Section 944.278 Florida Statutes (1993), which destroyed Petitioner's liberty interests in granted provisional credits, destroyed his liberty interest in release on his provisional release date, and destroyed his liberty interests in the procedures for revocation of his liberty interest, on its face or as applied to the Petitioner deprives the Petitioner of liberty and property without fair notice and procedure in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT CONCERNING THE PARTIES

The parties to the habeas corpus proceedings before the Florida Supreme Court were Petitioner, RUSSELL CALAMIA and Respondent, HARRY K. SINGLETARY, JR., in his official capacity as Secretary for the Florida Department of Corrections.

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OPINIONS BELOW

The opinion of the Florida Supreme Court in the underlying cause is set out in Appendix to this petition at A1.

JURISDICTION

The opinion of the Florida Supreme Court (A1) was entered on September 15, 1994. This Petition therefore is timely. Rule 13.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 10, cl. 1 Constitution of the United States:

"No State shall . . . pass any Bill of Attainder . . ."

"No State shall . . . pass any ex post facto law. . ."

Amendment XIV, Section 1, Constitution of the United States:

No State shall...deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

On July 27, 1994 the Petitioner filed a petition for writ of habeas corpus before the Florida Supreme Court. The Florida Supreme Court denied the petition for a writ of habeas corpus on September 15, 1994. (A1).

The petition raised three issues: whether the retroactive application of exclusions from eligibility for, and cancellation of, provisional gain time credits violates the Ex Post Facto Clause of the United States Constitution, whether the cancellation of provisional credits is an unconstitutional violation of the prohibition against bill of attainder and lastly, whether the cancellation of provisional credits without notice or hearing violates the Petitioner's due process rights under the United States Constitution.

The verified petition relied on the following facts. On or about January 28, 1986, Petitioner was charged by indictment with one count of first degree murder, a capital felony punishable by life imprisonment or death, allegedly committed on January 3, 1986. In December of 1987 a jury was selected for Petitioner's trial and the trial began shortly thereafter.

The state attorney and Petitioner's trial attorney held extended plea negotiations before and during trial. During trial, the state attorney offered to reduce the charge to one count of second degree murder in exchange for Petitioner's plea of *nolo contendre* or guilty. In explaining this offer, Petitioner's trial attorney explicitily assured Petitioner that Petitioner would be eligible to earn administrative gain time and "good time" which would be applied to reduce his sentence after Petitioner completed any minimum mandatory portion of Petitioner's sentence.

Based on his trial counsel's assurances, Petitioner agreed to enter a plea of *nolo contendre* to second degree murder. Petitioner materially relied on his future eligility for administrative gain time and a possibility of a decreased sentence under section 944.276, Florida Statutes (1987) in deciding to agree to enter a plea of *nolo contendre*.

On December 10, 1987, the Circuit Court of the Eighteenth Judicial Circuit, Brevard County, Florida, accepted the negotiated plea under which the petitioner pleaded nolo contendre to second degree murder.

On January 14, 1988 the trial court sentenced Petitioner to a term of incarceration of twenty years, including a three year minimum mandatory sentence for use of a firearm. Petitioner was accredited with 250 days towards his sentence for time previously served.

Petitioner is currently confined at Polk Correctional Institution pursuant to that judgment and sentence.

There are no other sentences, concurrent or consecutive, pending against Petitioner. Petitioner was eligible at the time of his conviction for administrative gain time under section 944.276, Florida Statutes (1987), excluding the three year minimum mandatory portion of the sentence.

Section 944.276(1) Florida Statutes (1987) provided that when the inmate population reached 98 percent of lawful capacity the Secretary of the Department of Corrections [DOC] had authority to award up to 60 days administrative gain-time to all inmates who were earning incentive gain time. The DOC Secretary awarded administrative gain-time to all eligible DOC inmates from February 16, 1987 until June 30, 1988.

On June 18, 1988 the Florida Legislature repealed section 944.276 and substituted the Provisional Credits Act. Act of June 18, 1988, ch. 88-122, §5, 1988 Fla. Laws 527, 535 (codified, as amended, at § 944.277, *Fla. Stat.* (Supp. 1988-1991)). The 1988 Act lowered the triggering percentage from 98 percent to 97.5 percent and required the DOC to give credits to all eligible inmates earning incentive gain time. Act of June 18, 1988, ch. 88-122, §5, 1988 Fla. Laws 527, 535 (codified, as amended, at § 944.277(1),(4) *Fla. Stat.* (Supp. 1988-1991)). DOC immediately began awarding provisional credits and continued to do so until the section 944.277 Florida Statutes was repealed in 1993.

On May 8, 1990 Petitioner completed his three year minimum mandatory sentence and the DOC began to award Petitioner both incentive gain time for meritorious behavior and provisional credits under the 1988 Provisional Credits Act.

The DOC awarded Petitioner a total of 420 days (1 year, 1 month and 25 days) provisional credits between May 8, 1990 and January 1991 in addition to Petitioner's accrued incentive gain time. Petitioner's provisional release date was August 23, 1998 based on provisional credit days actually awarded to Petitioner through January 1991.

Effective July 6, 1992, the Florida Legislature amended Section 944.277(1) and excluded persons incarcerated for second-degree murder from provisional release credit eligibility. The statute did not state it was to be applied retroactively.

On December 29, 1992 the Attorney General of Florida, Bob Butterworth, issued Attorney General Opinion 92-96. 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1993) 1992 Annual Report of the Attorney General of Florida 283. The Attorney General interpreted the 1992 amendments to the provisional release law to require the DOC to apply the exclusions in section 944.277 (1) (h) and (i) retrospectively to all inmates in the custody of the DOC on July 6, 1992. *Id.* at 288. In addition the Attorney General instructed the DOC to void all provisional credits previously awarded to offenders covered by section 944.277(1) (h) and (i). *Id.*

On May 7, 1993, pursuant to the Attorney General's opinion, the DOC applied the amended exclusions retroactively and revoked Petitioner's 420 accumulated days of provisional release credits and canceled Petitioner's provisional release date of August 23, 1998. The DOC canceled Petitioner's accumulated provisional release credits without notice to Petitioner or opportunity for hearing by the Petitioner.

On June 17, 1993 the Florida Legislature's Safe Streets Initiative of 1994, ch. 93-406, §§ 32, 35, 44, 1993 Fla. Laws 29 (§35 to be codified at § 944. 278, Fla.

Stat. (1993) became effective. Section 35 of the Safe Streets Initiative of 1994, codified at section 944.278 Florida Statutes (1993), canceled all administrative and provisional credits awarded under prior overcrowding credit statutes.

Had the Petitioner's credits not been canceled by the DOC, pursuant to the Attorney General's opinion, they would have been lost due to provisions of section 944.278 Florida Statutes (1993).

As a direct result of the retroactive application of section 944.277(1)(i) Florida Statutes (Supp. 1992) and the passage of section 944.278 Florida Statutes (1993). Petitioner's sentence is 420 days longer than it would have been under the statute that was in force when he was sentenced.

Additionally, Petitioner has lost the opportunity to continue to earn provisional credits as he was eligible to do under section 944.277, Florida Statutes (Supp. 1988-1991) at the time he was sentenced. Petitioner would be entitled to immediate release if Petitioner had continued to accrue provisional credits through the present.

Respondent Singletary is the Secretary of the Florida Department of Corrections and is ultimately responsible for Petitioner's custody.

REASONS FOR GRANTING THE WRIT

1. Question 1 above stated: Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277 (1) (i), Florida Statutes (Supp. 1992), to offenses committed before the effective date of the statute and the effect of the passage of section 944.278, Florida Statutes (1993) violate the prohibition against *ex post facto* laws in Article I, Section 10, Clause 1 of the United States Constitution.

This Court should grant certiorari to settle a conflict in application of the law of this Court, uphold a fundamental federal right, and determine an issue of great public importance.

Article I of the Untied States Constitution mandates that no State shall pass any "Ex Post Facto Law." *U.S. Const.*, art. I section 10 cl. 1. This Court has held that this basic statement of law is to ensure that citizens receive notice of the substance and effect of the laws of the land and allows individuals to rely on their content and meaning. *Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Dobbert v. Florida*, 432 U.S. 282, 298 (1977).

This Court has previously instructed the State of Florida that a law is in violation of the *ex post facto* clause if it (1) is retrospective in that it applies to events which took place before its passage and (2) disadvantages the individual affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Miller v. Florida*, 482 U.S. 423, 433-34 (1987).

The provisions of both Section 944.277, Florida Statutes (1992) and 944.278 Florida Statutes (1993) are retroactively applied to inmates who were convicted for acts committed before the effective date of the statutes. Additionally, both statutes, as applied, and on the face of section 944.278, add new consequences to acts committed before the effective date of the statutes. Thus both provisions make Petitioner ineligible to serve a shorter sentence for which he was previously eligible.

The effect of the retroactive legislation dramatically alters the prison sentence to be served by the Petitioner. Petitioner has lost 420 days of credits and the potential to earn additional credits each month that the prison system remains at 98% capacity and for which he earns incentive gain time. The effect of serving the increased time is additional punishment retroactively applied to the Petitioner.

This Court has held that a retroactive decrease in the amount of gain time Florida inmates could earn was in violation of the *Ex Post Facto* Clause. *Weaver v. Graham*, 450 U.S. 24, (1981). Because Weaver and like inmates would serve a longer sentence under the retroactive application of the gain time statute, this Court found that the gain time scheme was a determinant of the sentence length. *Id.* Thus the petitioner was retroactively disadvantaged by the new scheme and the law was struck down as *ex post facto*.

The issue of retroactive ineligibility for overcrowding credits has been previously ruled on by the Tenth Circuit in *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991).

The facts of *Arnold* are virtually identical to the facts presented in the instant case. In that case the Tenth Circuit ruled that amendments to the Oklahoma Prison Overcrowding Emergency Powers Act, Okla.Stat. tit. 57 §§ 570-576 as applied, violated the ex post facto clause by making that petitioner retroactively ineligible for overcrowding credits. *Arnold v. Cody*, 951 F.2d 280, 281 (10th Cir. 1991).

The *Arnold* court relied on the judicial authority of *Weaver v. Graham, supra*, and applied the factors that are listed in that case. *Arnold* at 281. The Tenth Circuit held that the amendment to the statute met both requirements. *Id.* at 283. The amendment applied retroactively and the effect of the additional eligibility requirement was disadvantageous to that petitioner. *Id.* The amendment foreclosed the possibility of a shortened prison stay, which the petitioner was entitled to under the law in effect at the time he committed the offense. *Id.* The fact that the statute was enacted to alleviate overcrowding was not found to be significant. *Id.*

The Supreme Court of Florida has also recently ruled on this issue, in a *pro se* case. *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994). However, the outcome of that case is contra to the law as applied in *Arnold*. In *Griffin* the Florida court found that the application of section 944.277 (1992) was not an unconstitutional violation of the *ex post facto* clause. This ruling is in error and requires review by this Court.

Although the *Griffin* court correctly cites *Weaver* as the controlling law it fails to apply the test clearly set out in *Weaver*. *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994). Instead of analyzing whether the law was applied retrospectively and whether its effects disadvantaged the petitioner, the Florida court relies on irrelevant factors which this Court and other federal courts have ruled to be impermissible considerations in an *ex post facto* analysis.

In *Griffin* that court includes findings that administrative and provisional credits are not subject to the *ex post facto* prohibitions because the credits are "not a reasonable quantifiable expectation at the time the inmate is sentenced". *Id.* at 501. Additionally, that court holds in *Griffin* that provisional credits are an "inherently arbitrary and unpredictable possibility that is awarded based solely on the happenstance of prison overcrowding". *Id.* However the *Weaver* factors are not applied to the facts in *Griffin*.

Additionally, the *Griffin* opinion incorrectly relies on the predictability of an award of overcrowding credits. In an Eleventh Circuit case, that court stated that it is not the duty of the court to speculate on the possibility of the award of gain time but merely determine whether there is an *opportunity* to shorten the time spent in prison. *Raske v. Martinez*, 876 F.2d 1496, 1500 (11th Cir. 1989), *cert. denied*, 493 U.S. 993, 110 S. Ct. 543, 107 L. Ed. 2d 540 (1989) (emphasis added).

The law at issue created such an opportunity. The prison system in Florida has been historically overcrowded. *e.g. Costello v. Waignwright*, 397 F. Supp. 20 (M.D. Fla 1975), *rev'd* 430 U.S. 325 (1977). The Legislature

created the overcrowding credit statutes to alleviate the overcrowding. Not only was there an opportunity to earn credits, credits were awarded to eligible inmates over a period of years. Additionally, those entering into plea bargains were aware of the awards of overcrowding credits and took this into consideration when making their decisions to plead guilty or no contest. Like the Petitioner, these inmates were aware that the prison system was overcrowded and that this was the method DOC had employed to alleviate that problem. The overcrowding credit statute in effect at the time Petitioner entered a change of plea and was sentenced, gave him a clear opportunity to shorten his time spent in prison.

The *Griffin* decision also relies on the assertion that the overcrowding credits were in no way part of the original sentence. *Griffin* at 501. This has been held to be a non-determinative inquiry. *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). This Court in *Weaver* held that it need not determine that the prospect of gain time is a part of the sentence, it must only be a determinant of the prison term and because of the retroactivity of the law the sentence to be served has been lengthened. *Weaver* at 32, 101 S. Ct. 960, 67 L. Ed. 2d 17.

The *Griffin* opinion does not analyze the effects of the law which place section 944.277 Florida Statutes (Supp. 1992) and section 944.278 Florida Statutes (1993) in violation of the *ex post facto* prohibitions. Instead the opinion is based on a new analysis of possibilities and likelihoods of an award of overcrowding credits.

The *Arnold* case is correctly decided and accurately states the law found in *Weaver* and other federal cases. The opinion of the Florida Supreme Court is in direct conflict with the Tenth Circuit and fails to properly apply the applicable federal law. The law set out in *Griffin* which was the basis for the Florida Supreme Court's denial of the Petitioner's Writ of Habeas Corpus requires the review of this Court.

This Court should grant certiorari in order to settle the conflict of law between the Tenth Circuit and the highest court of the State of Florida and also to protect a fundamental federal right.

2. Question 2 above stated: Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277 (1) (i), Florida Statutes (Supp. 1992) and Section 944.278 Florida Statutes (1993), is an unconstitutional violation of the prohibition against bill of attainder contained in Article I, Section 10, of the United States Constitution.

This past term this Court once again identified Bills of Attainder as examples of prohibited retroactive legislation. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994). This Court should grant certiorari in this case and uphold that principle of law in order ensure a basic federal right.

The United States Constitution provides that "[n]o state shall...pass any Bill of Attainder..." A legislative act is a bill of attainder if it: (1) inflicts punishment, (2) against identifiable individuals, (3) without judicial trial. *Selective Services System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-847 (1984). The cancellation of Petitioner's provisional credits by retroactive application of section 944.277 Florida Statutes (Supp. 1992) and section 944.278 Florida Statutes (1993) is punishment by an increase of prison terms against individuals, like Petitioner, who were already incarcerated, without judicial trial.

This Court has ruled that an act is punishment under the jurisprudence of bill of attainder if it either: (1) falls within the historical category of punishment, (2) functionally furthers no non-punitive legislative purposes, or (3) the legislative history shows a motivational intent to punish. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 473-484 (1977).

Increase in prison term through cancellation of provisional credits falls under the first test as a historical category punishment. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

The retroactive cancellation of provisional credits section 944.277 Florida Statutes is directed against only the identifiable individuals consisting of

Department of Corrections inmates who fell within one of the amended categories of exceptions. The cancellation of credits through section 944.278 Florida Statutes was directed at the identifiable group of all Department of Corrections inmates.

Both the Attorney General's 1992 opinion interpreting section 944.277, Florida Statutes (1991) and the passage of section 944.278 Florida Statutes (1993) were initiated in response to the current unpopularity of the early release programs. Attorney General Opinion 92-96 was released in response to the public outrage over the pending release of a notorious criminal, Donald McDougall. *Op. Att'y Gen. Fla.* 92-96 at 283 (1992). See also, Roger Handberg and N. Gary Holten, *Reforming Florida's Sentencing Guidelines* 82 (1993) (discussing political response to McDougall controversy); Barbara Walsh, *Inmates Identify A Secret State Rounding Up Wrongly Released*, Sun-Sentinel, January 15, 1993, at 1B (quoting Attorney General Butterworth: "The McDougall case woke everybody up. Society has no use for violent offenders.")

Section 944.278 Florida Statutes (1993) was passed shortly after the McDougall incident in response to public outcry against early release of prisoners. Roger Handberg and N. Gary Holten, *Reforming Florida's Sentencing Guidelines* 82 (1993).

Finally, the statutes at issue retroactively changed eligibility for provisional credits and retroactively canceled all provisional credits already awarded causing an increase in prison term without the benefit of a judicial trial.

The Florida Supreme Court's denial of the Petitioner's Writ of Habeas Corpus was in error and requires review from this Court to preserve an important federal right.

3. Question 3 above stated: Whether Section 944.277 (1) (i), Florida Statutes (Supp. 1992) and Section 944.278 (1993), which destroyed Petitioner's liberty interests in granted provisional credits, destroyed his liberty interest in release on his provisional release date, and destroyed his property interests in the procedures for revocation of his liberty interest, on its face or as applied to the Petitioner deprives the Petitioner of liberty and property without fair notice and procedure in violation of the Fourteenth Amendment to the United States Constitution.

This Court should grant certiorari to ensure the fundamental right of constitutional due process.

The Fourteenth Amendment, *U.S. Const.* amend. XIV, section 1, precludes arbitrary deprivations of liberty and property interests and mandates that any deprivation of those interests to be accomplished only through fair, federally prescribed procedure. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-31 (1982); *Wolff v. McDonnell*, 418 U.S. 539, 555-58 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973).

This Court has held that a liberty interest may arise from two sources, the Due Process Clause and the laws created by a state. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1988), *Wolff v. McDonnell*, 418 U.S. 539, 557 (1973). A state creates a protected interest when the language of the provision provides "substantive predicates" to guide the officials' discretion. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1988).

Said language must contain mandatory language giving directives to guide the acts of the official once the "substantive predicate" has been met. *Id.*

The statutes and rules at issue in this case contain the necessary mandatory language which require a substantive predicate and mandate a certain outcome. Chapter 944, Florida Statutes provides that when the

prison population reaches a certain capacity the Secretary of the Department of Corrections has the authority to award provisional credits. Section 944.277(1). Once the decision to award credits is made the Secretary must award credits to each eligible inmate who is incarcerated on the date of the award and who is earning incentive gain time. That section also mandates that a provisional release date be established for each inmate. Section 944. 277(4) *Fla. Stat.* (Supp. 1988 - Supp. 1992). Any inmate who has received thirty or more days of provisional credits "must be released" on his or her provisional release date. Section 944.277(5) *Fla. Stat.* (Supp. 1988 - Supp. 1992).

The Department of Corrections administrative rules echo the mandates found in the Florida statutes. Sections 33-28.0019(1), 33-28.002, *Fla. Admin. C.* (1992).

The nature of provisional credits do not differ in any substantial way from the other types of gain time in which this Court has found a liberty or property interest deserving of due process protection. Although the main task of the provisional credits system was to alleviate prison overcrowding, the effort put forth by the inmate to obtain the provisional credits and the effect of the award of credits to the inmate are identical to that of incentive gain time.

In order to earn provisional credits the inmate must also qualify for incentive gain time. Section 944.277 *Fla. Stat.* (Supp. 1988 - Supp. 1992). Thus it is pivotal that the inmate be on his or her best behavior and that he or she attempt to participate in work or educational programs as they become available. Once credits were awarded, the inmate received a new provisional release date giving him or her an earlier date for release from incarceration. Effectively the Petitioner and other inmates like him demonstrated good behavior and were rewarded for that behavior with a shortened sentence.

The language used by the legislature and the Department of Corrections in these statutes and agency rules create a presumption that credits will

be awarded and inmates will be released when certain conditions exist. By employing such language the State has created a liberty interest in the provisional release credits. *Kentucky Department of Corrections of Corrections v. Thompson*, 490 U.S. 454, 460 (1988).

This Court has held directly on point, that "where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length on imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily."*Superintendent, Mass. Correctional Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985).

Once a liberty or property interest is created by the State that interest may be revoked only through constitutional notice, opportunity to be heard and written justification.*Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1973).

In violation of the procedural due process clause of the United States Constitution, the Petitioner was afforded no notice, opportunity to be heard or written justification for the acts taken. The Respondent's summary cancellation of those credits was an erroneous and arbitrary act which the due process clause protects against.

This Court should grant certiorari to uphold the Petitioner's federal right under the Due Process Clause of the United States Constitution and to decide a question of great public importance.

CONCLUSION

This Court should issue the Writ for review of the questions presented above.

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INDEX TO APPENDIX

Decision of the Florida Supreme Court
in the underlying appeal A1

SUPREME COURT OF FLORIDA

Thursday, September 15, 1994

RUSSELL CALAMIA,
Petitioner,

v. CASE NO. 84,088

HARRY K. SINGLETARY, JR.,
ETC,.

Respondent.

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The Petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby ordered denied.

GRIMES, C.J., OVERTON, SHAW,
HARDING and WELLS, JJ., concur